TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 174.

NICHOLAS V. HALTER AND HARRY V. HAYWARD,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED DECEMBER 28, 1905.

(20,026.)

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INDEX.

	Original.	Print.
Caption	1	1
Petition in error	1	1
Transcript from district court	4	2
Caption	4	2
Information	5	3
Trial	7	4
Charge of the court	8	5
Exceptions to charge	10	6
Verdict	11	7
Motion of Halter for new trial	12	7
Motion of Hayward for new trial	13	8
Order overruling motion of Hayward for new trial	15	9
Judgment against Hayward	16	10
Order overruling motion of Halter for new trial	17	10
Judgment against Halter	17	10
Bond on appeal	18	11
Clerk's certificate	19	11
Bill of exceptions from district court	20	12
Stipulation as to evidence, &c.	22	13
Judge's certificate	23	13
Clerk's certificate	24	13

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	Original.	Print.
Stenographer's certificate	24	14
Objections of defendants to evidence	26	14
Admissions	27	15
Offers of exhibits	29	16
Motion for verdict for defendants	30	16
Exhibit No. 1—Large label	32	17
2—Neck label	34	18
3—Cap label	36	19
Summons in error	38	20
Submission	39	21
Judgment	39	21
Opinion	41	21
Petition for writ of error	53	27
Assignment of errors	55	28
Writ of error	60	30
Allowance of writ of error	61	31
Bond on writ of error	62	31
Citation and service	66	33
Clerk's certificate	67	34

1 No. 13955.

NICHOLAS HALTER, NARRY V. HAYWARD
v.
STATE OF NEBRASKA.

Pleas Before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol, in the City of Lincoln, in said State on the 19th day of September, A. D. 1905.

Present: Hon. Silas A. Holcomb, Chief Justice, Hon. S. H. Sedgwick, Judge, Hon. John B. Barnes, Judge.

Attest: H. C. LINDSAY, *Clerk.*

Be it Remembered, That on the 21st day of September, 1904, there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER, HARRY V. HAYWARD, Plaintiffs in Error,
v.
STATE OF NEBRASKA, Defendant in Error.

Petition in Error.

Come now the plaintiffs in error and show to the Court that on the 8th day of July, 1904, in the District Court of Douglas county, Nebraska, in an action therein pending wherein the State of Nebraska was plaintiff, Nicholas V. Halter and Harry V.
2 Hayward were defendants. Said defendant in error recovered a judgment and verdict against said plaintiffs in error finding said plaintiffs in error guilty of misdemeanor and judging that each of said plaintiffs in error pay a fine of $50.00, and for costs of said prosecution. A transcript of the proceedings containing said judgment is filed herewith. Plaintiffs in error allege that there was error in the rulings and judgment of the Court in this:

1. The Court erred in overruling the objection of the plaintiffs in error herein to the introduction of any testimony or evidence whatever in this case.

2. The Court erred in overruling the motion of the plaintiffs in error to instruct the jury to return a verdict for the plaintiffs in error, for the following reasons:

3. That the law upon which this information is based is in violation of the constitution- of the State of Nebraska and of the United States, and particularly section one, of article 14 of the amendments of the constitution of the United States and therefore null and void.

4. That the law upon which this information is based infringes upon the personal liberty guaranteed to the plaintiffs in error by the

constitution of the United States and the constitution of the State of Nebraska, and also deprives the plaintiffs in error as citizens of the United States, of the right of exercising a privilege, impliedly if not expressly guaranteed to them by the Federal constitution and the laws of the United States.

5. That the laws upon which this complaint is based permits the use of the National flag by publishers and newspapers, books
3 and periodicals, and forbids its use, under penalty for advertising purposes generally, thus discriminating in favor of one class and against others, and is, therefore class legislation and null and void.

6. That the verdict is not sustained by sufficient evidence.

7. That the verdict is contrary to law.

8. Errors of law occurring at the trial.

9. The Court erred in giving instruction number one, duly excepted to at the trial.

10. The Court erred in giving instruction number two, duly excepted to at the trial.

11. The Court erred in overruling the motion of said plaintiffs and each of them for a new trial.

12. The Court having erred against said plaintiffs in error as set forth in paragraphs one to ten inclusive herein, the said plaintiffs for said reasons were entitled to a new trial and the Court therefore erred in overruling said motion of plaintiffs for a new trial. Wherefore the plaintiffs in error pray that the judgment of the lower Court be set aside and a new trial granted.

COOPER & DUNN AND
S. R. RUSH,
Att'ys for Pl'ffs in Error.

Endorsed: 13955. Halter, *et al. v.* State. Petition in Error. Supreme Court of Nebraska. Filed Sep. 21 1904. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the
4 Clerk of said Supreme Court a certain Transcript in the words and figures following, to-wit:

C. Doc. 8, No. 137.

STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Transcript to Supreme Court.

For I. J. Dunn and S. R. Rush.

Transcript Fees	$4.35
Binding fees	.75
Total	$5.10 Pd. by Defendants.

FRANK A. BROADWELL, *Clerk,*
By JOHN H. GROSSMAN, *Deputy.*

App. Doc. 8, Number 137.

Pleas before the Honorable E. M. Bartlett one of the Judges and the presiding Judge, of the District Court of the Fourth Judicial District of the State of Nebraska, at a Term thereof within and for the County of Douglas, begun and held at the city of Omaha, on the 2nd day of May, A. D., 1904.

Information.

Be it Remembered, That heretofore, to-wit: On the 27th day of June, A. D., 1904, James P. English, County Attorney in and for the County of Douglas and State of Nebraska, filed in the
5 office of the Clerk of said Court, an Information against H. V. Hayward, for Desecration of Flag, which said Information reads and is in the words and figures following, to-wit:

STATE OF NEBRASKA, *County of Douglas, ss:*

Of the May Term of the District Court of the Fourth Judicial District of the State of Nebraska, within and for the County of Douglas, and State of Nebraska, in the year of our Lord nineteen hundred and four, I, Jas. P. English County Attorney, in and for the County of Douglas in said State of Nebraska, who prosecutes for and on behalf of said State, in the District Court of said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offences committed in said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the court to understand and be informed, that on the 28th day of December in the year of our Lord nineteen hundred and three, H. V. Hayward and Nicholas V. Halter late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska, aforesaid, then and there being, did then and there unlawfully expose to public view, sell, expose for sale, and have in their possession for sale an article to-wit: a bottle of beer, being an article of merchandize, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containing said
6 representation of the flag of the United States of America was so placed, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska.

JAMES P. ENGLISH,
County Attorney.

STATE OF NEBRASKA, *County of Douglas, ss:*

I, James P. English being first duly sworn, on oath depose and say that I know the contents of the foregoing information; that I

have read the same, and the facts set forth in said information are true, to the best of my knowledge and belief.

JAMES P. ENGLISH.

Subscribed in my presence and sworn to before me this 27th day of June, A. D., 1904.

FRANK A. BROADWELL,
Clerk of the District Court,
[SEAL.] By JOHN H. GROSSMANN, *Deputy.*

Indorsed: App. Doc. 8. No. 137. District Court, Douglas County The State of Nebraska, *vs.* H. V. Hayward, *et al.* Information. Charge *Discretion* of flag. Filed June 27th, 1904. Frank A. Broadwell, Clerk. By John H. Grossmann, Deputy. June, 27th, 1904. Defendants arraigned and waive reading of information. Plea not guilty. Frank A. Broadwell, Clerk. Witnesses: John H. Berger.

Afterward, at the May term of Court and on the 27th day of June, 1904, Trial was had and Verdict rendered herein as
7 appears on Page 472, Journal 89, and is in the words and figures following, to-wit:

Trial.

8–137.

THE STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Information: Desecration of the Flag of U. S.

Comes now the County Attorney on behalf of the State of Nebraska, the said defendants Harry V. Hayward and Nicholas V. Halter, being also present, attended by their counsel; and the said defendants in open Court waiving the reading of the information herein and being duly arraigned for plea thereto they and each of them say they are not guilty as charged therein.

Wherein the said defendants being duly arraigned for trial, come the following named persons as jurors, to-wit:

F. J. Fitch,	Jno. Brew,	Jim Mogensen,
J. B. Evans,	A. J. Harder,	A. A. McDonald,
Frank Hardy,	Jos. Flood,	C. H. Lear,
W. S. Sheldon,	Jno. F. Buckley,	Emil Motz,

and said parties waiving the examination of said jurors for cause, said jurors are duly impaneled and sworn according to law, and this cause proceeds.

And now this cause is heard upon the motion of the said defendants to direct the said jury to return herein a verdict of not guilty.

Upon consideration whereof, the Court being well advised in
8 the premises, it is by the Court ordered that the said motion be, and it hereby is, overruled. To which ruling of the Court the said defendants duly except.

Afterward on the 27th day of June, 1904, Charge of the Court was filed herein, which said Charge of the Court is in the words and figures following, to-wit:

Charge of Court.

In District Court, Douglas County, Nebraska.

STATE OF NEBRASKA, Plaintiff,
v.
HARRY V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Instructions to the Jury Given by the Court on its Own Motion.

GENTLEMAN OF THE JURY:

(*Instruction No.* 1.)

In this case the State of Nebraska has filed information against the defendants above named, charging that on the 28 day of December, in the year of our Lord nineteen hundred and three, the said defendants, being then and there in the County of Douglas and State of Nebraska, did then and there unlawfully expose to public view, sell, expose for sale, and have in their possession for sale, an article, to-wit, a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containing said representation of the flag of the
9 United States of America was so placed; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska. Given. E. M. Bartlett, Judge.

2. You are instructed that if you find from the evidence, beyond a reasonable doubt did on the 28 day of December, in the year of our Lord nineteen hundred and three, the said defendants, being then and there in the county of Douglas and State of Nebraska, did then and there expose to public view, sell, expose for sale, and have in their possession for sale, a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containng said representation of the flag of the United States of America was so placed; then and in that

case you should return a verdict of guilty in manner and form as charged in the information.

If on the other hand you should find that the evidence in this case does not sustain the charges against the defendants, as set forth in the first instructions of the Court herein, then you should find the defendants not guilty. Given. E. M. Bartlett, Judge.

Upon retiring to your room to deliberate concerning your verdict you will select one of your number as foreman. When you have agreed upon a verdict you will have your foreman sign the same, when you will all return into Court, in a body, with your verdict. Given. E. M. Bartlett, Judge.

Indorsed: C. 8. 137. State of Nebraska, *vs.* Harry V. Hayward and Nicholas V. Halter. Instructions to the Jury. Filed Jun- 27, 1904. Frank A. Broadwell, Clerk. Entered.

Defendants' Exceptions.

Afterward, on the 27th day of June, 1904, Defendants' exceptions were filed herein, which said Exceptions are in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
v.
HARRY V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Exceptions.

Come now the defendants and each of them and each for himself except- to instruction number one and two given by the court on its own motion.

HARRY V. HAWYARD,
NICHOLAS V. HALTER,
By COOPER & DUNN,
S. R. RUSH, *Their Attorneys.*

June 27, 1904.
Exception allowed,
E. M. BARTLETT.

Indorsed: C. 8, No. 137. In District Court of Douglas Co. State *v.* Hawyard, *et al.* Exception to instructions. Filed Jun. 27, 1904. Frank A. Broadwell, Clerk. Entered. Cooper & Dunn, S. R. Rush, For Def'ts.

And now the said jury having heard the statement of the case the testimony adduced, the argument of counsel and the instructions of the Court retire in charge of a sworn officer of the Court to deliberate upon their verdict.

And now come the said jury in open Court — present to the Court their verdict in writing as follows, to-wit:

Verdict.

STATE OF NEBRASKA:

In the District — of Douglas County.

STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendant-.

Verdict.

We, the jury duly empaneled and sworn to try the issue joined between the said parties do find the defendant-, Harry V. Hayward and Nicholas V. Halter guilty as charged in the information.

A. J. HARDER, *Foreman.*

Whereupon the said jury are discharged from further consideration of this case.

12 Afterward, on the 28th day of June, 1904, Motion for New trial was filed herein, which said Motion for New Trial is in the words and figures following, to-wit:

In the District Court in and for Douglas County, Nebraska.

STATE OF NEBRASKA, Plaintiff,
v.
NICHOLAS V. HALTER, HARRY V. HAYWARD, Defendant-.

Motion for a New Trial.

The defendant Nicholas V. Halter, moves the Court for a new trial in the above entitled cause for the following reasons effecting materially his substantial rights:

1. That the Court erred in overruling the objections of the defendant herein to the introduction of any testimony or evidence whatever in this case.

2. The Court erred in overruling the motion of the defendant to instruct the jury to return a verdict for the defendant, for the following reasons:

A. That the law upon which this information is based is in violation of the constitution of the State of Nebraska and of the United States, and particularly section one, of article 14 of the amendments to the constitution of the United States and therefore null and void.

B. That the law upon which this information is based infringes upon the personal liberty guaranteed to the defendant by the constitution of the United States and the constitution of the State of Nebraska, and also deprives the defendant as a citizen of the United States, of the right of exercising a privilege, impliedly if not expressly guaranteed to him by the Federal constitution and the laws of the United States.

C. That the law upon which this complaint is based per-
13 mits the use of the National Flag by publishers and newspapers, books and periodicals, but forbids its use, under penalty for advertising purposes generally, thus discriminating in favor of one class and against other-, and is, therefore, class legislation and null and void.

3. That the verdict is not sustained by sufficient evidence.

4. That the verdict is contrary to law.

5. Errors of law occurring at the trial.

6. The Court erred in giving instructions numbered one and two, duly excepted to at the trial.

I. J. DUNN,
S. R. RUSH,
Attorneys for Defendants.

(Indorsed:) Doc. 8. No. 137. District Court, Douglas County, State of Nebraska, *vs.* Nicholas V. Halter and Harry V. Hayward. Motion for new trial. Filed June 28, 1904. Frank A. Broadwell, Clerk. Entered. I. J. Dunn, S. R. Rush, Att'ys for Def'ts.

Afterward, on the 28th day of June, 1904, Motion for New Trial was filed herein, which said Motion is in the words and figures following, to-wit:

Motion for New Trial.

In the District Court in and for Douglas County, Nebraska.

STATE OF NEBRASKA
vs.
NICHOLAS V. HALTER, HARRY V. HAYWARD.

Motion for a New Trial.

14 The defendant Harry V. Hayward moves the Court for a new trial in the above entitled cause for the following reasons effecting materially his substantial rights.

1. That the Court erred in overruling the objection of the defendant herein to the introduction of any testimony or evidence whatever in this case.

2. The Court erred in overruling the motion of the defendant to instruct the jury to return a verdict for the defendant for the following reasons:

a. That the law upon which this information is based is in violation of the constitution of the State of Nebraska and of the United States, and particularly section one, of article 14 of the amendments to the constitution of the United States and therefore null and void.

b. That the law upon which this information is based infringes upon the personal liberty guaranteed to the defendant by the constitution of the United States and the constitution of the State of Nebraska, and also deprives the defendant as a citizen of the United

States, of the right of exercising a privilege, impliedly if not expressly guaranteed to him by the Federal constitution and the laws of the United States.

c. That the law upon which this complaint is based permits the use of the national flag by publishers and newspapers, books and periodicals, but forbids its use, under penalty for advertising purposes generally, thus discriminating in favor of one class and against other-, and is, therefore class legislation and null and void.

3. That the verdict is not sustained by sufficient evidence.

4. That the verdict is contrary to law.

5. Errors of law occurring at the trial.

6. The Court erred in giving instructions numbered one and two, duly excepted to at the trial.

I. J. DUNN,
S. R. RUSH,
Attorneys for Defendants.

(Indorsed:) Doc. 8. No. 137. District Court, Douglas County, State of Nebraska, *vs.* Nicholas V. Halter and Harry V. Hayward. Motion for new trial. Filed Jun- 28, 1904. Frank A. Broadwell, Clerk. Entered. I. J. Dunn, S. R. Rush, Att'ys for Def'ts.

Afterward, at the May term of Court and on the 8th day of June, 1904, An Order overruling Motion and Judgment on Verdict was entered herein, as appears on Page 481, Journal 89, and is in the words and figures following, to wit:

Order Overruling Motion and Judgment on Verdict.

8–137.

THE STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Information: Desecrating the Flag of U. S.

Comes now the County Attorney on behalf of the State of Nebraska, the said defendant H. V. Hayward (impleaded with Nicholas V. Halter), being also present, attended by his counsel. And now this cause comes on to be heard upon the motion of the said defendant for a new trial of this action. Upon consideration whereof, the Court being fully advised in the premises, it is by the Court ordered that the said motion be, and it hereby is, overruled. To which ruling of the Court the said defendant duly excepts. Whereupon the said defendant, H. V. Hayward, being duly arraigned for sentence, is informed by the Court of the verdict of guilty heretofore returned against him, of the consequences thereof and of the punishment attached by law thereto, and being inquired of if he has anything to say why the sentence of the Court should not now

be pronounced upon him, and showing no good and sufficient cause to the contrary.

It is therefore considered, ordered, and adjudged by the Court that the said defendant, H. V. Hayward, pay a fine in the sum of Fifty Dollars ($50) together with the costs of this prosecution, taxed at $— for all of which execution is hereby awarded.

To all of which the said defendant duly excepts, and is by the Court allowed forty (40) days from the rising of Court in which to prepare and serve his bill of exceptions herein.

Afterward, at the May term of Court and on the 8th day of July, 1904, Order overruling Motion and Judgment on Verdict was entered herein, as appears on Page 482, Journal 89, and is in the words and figures following, to-wit:

17 *Order Overruling Motion and Judgment on Verdict.*

8–137.

THE STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Information: Desecration of Flag of U. S.

Comes now the County Attorney on behalf of the State of Nebraska, the said defendant, Nicholas V. Halter (impleaded with H. V. Hayward), being also present, attended by his counsel. And now this cause comes on to be heard upon the motion of the said defendant for a new trial of this action. Upon consideration whereof, the Court being well advised in the premises, it is by the Court ordered that the said motion be, and it hereby is, overruled. To which ruling of the Court the said defendant duly excepts.

Whereupon the said defendant, Nicholas V. Halter, being duly arraigned for sentence, is informed by the Court of the verdict of guilty heretofore returned against him, of the consequences thereof and of the punishment attached by law thereto, and being inquired of if he has anything to say why the sentence of the Court should not now be pronounced upon him, and showing no good and sufficient cause to the contrary. It is therefore considered, ordered and adjudged by the Court that the said defendant, Nicholas V. Halter, pay a fine in the sum of Fifty Dollars ($50), together with the costs of this prosecution, taxed at $—, for all of which execution is hereby awarded.

18 To all of which the said defendant duly excepts, and is by the Court allowed forty days from the rising of Court in which to prepare and serve his bill of exceptions herein.

E. M. BARTLETT, *Judge.*

Afterward, on the 26th day of August, 1904, a Bond was filed herein, which said Bond is in the words and figures following, to-wit:

Bond.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
v.
HARRY V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Bond.

Know all men by these presents: That on the — day of —, 1904, at the May term of the District Court of Douglas county, Nebraska, said defendants were convicted upon the charge of "desecrating the flag," and that there was a judgment entered therein, and a fine of $100 and costs assessed against each of said defendants, and

Whereas, said defendants intend to appeal said case to the Supreme Court of the State of Nebraska,

Now, therefore, we, the above named Harry V. Hayward and Nicholas V. Halter, principals, and Walter Moise surety, do undertake to the state of Nebraska, in the penal sum of $300.00 that the said defendants will prosecute said appeal without unnecessary delay, and if said judgment shall be affirmed in whole or in part, said defendants will appear in the District Court of Douglas County in response to the judgment thereof in said cause, and will satisfy the judgment and costs in said case.

19

NICHOLAS V. HALTER,
By I. J. DUNN, *His Attorney.*
HARRY V. HAYWARD.
WALTER MOISE.

The above bond approved this 26th day of August, 1904.
E. M. BARTLETT, *Judge.*

Indorsed: Doc. 8. No. 137. In the District Court of Douglas county, Nebraska. The State of Nebraska, Plaintiff, *vs.* Harry V. Hayward, and Nicholas V. Halter, Defendants. Bond. Filed August 26, 1904. Frank A. Broadwell, Clerk. Entered.

THE STATE OF NEBRASKA, *Douglas County, ss:*

I, Frank A. Broadwell, Clerk of the District Court, in and for Douglas County, Nebraska, do hereby certify that the foregoing is a full and true Transcript of the proceedings and record (see 55th Neb. p. 472) had in the cause in the District Court, containing the Information, Trial, Charge of Court, Verdict, Defendant's Exceptions. Motion for New Trial, Motion for New Trial, Order overruling Motion and Judgment on Verdict, Order Overruling Motion and Judgment on Verdict, Bond in the case of The State of Nebraska against H. V. Hayward, and Nicholas V. Halter, appearing of record in said Court.

20

Witness my signature and the seal of said Court at the City of Omaha, this 18th day of July, A. D., 1904.

[SEAL.] FRANK A. BROADWELL, *Clerk*,
By JOHN H. GROSSMANN, *Deputy*.

Endorsed: 13955. Halter, *et al.*, *v.* State. Transcript. Supreme Court of Nebraska Filed Sep. 21 1904. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions in the words and figures following, to-wit:

STATE OF NEBRASKA
vs.
H. V. HAYWARD and NICHOLAS V. HALTER.

Entered.
Filed Aug. 26 1904.
FRANK A. BROADWELL, *Clerk*.
CHAS. W. PEARSALL, *Reporter*.

21 OMAHA, NEBRASKA, *Aug. 8th*, 1904.

Received from S. R. Rush and I. J. Dunn, Attorneys for defendants, herein, for examination and amendment, a draft of a bill of exceptions in the case of the State of Nebraska, *vs.* H. V. Hayward and Nicholas V. Halter, tried in the District Court of Douglas county, Nebraska, at the regular May, 1904, term of said Court.

JAMES P. ENGLISH,
County Attorney.
JOHN W. PARISH,
WILLIAM F. GURLEY,
Attorneys for State.

Filed Aug. 26 1904
FRANK A. BROADWELL, *Clerk*.

I herewith return the Bill of Exceptions in the within entitled cause, submitted to me on the — day of —, 1904, and propose — amendments.
Dated this — day of —, 1904.

——— ———.

Received within Bill of Exceptions from James P. English, County Attorney, John W. Parish and W. F. Gurley, Attorneys for Plaintiff, this 12th day of Aug, 1904.

———— ————,
Attorneys for Defendants.

Entered.

22 OMAHA, NEBRASKA, *Aug. 12th*, 1904.

It is hereby stipulated and agreed, by and between the parties hereto, plaintiff and defendants, that the within and following transcript is a true and complete copy of all the evidence, oral and documentary, offered or received upon the trial of the above entitled cause, by either of the parties hereto together with all objections and motions made by either party, the rulings of the Court on same, and the exceptions of the respective parties to such rulings.

JAMES P. ENGLISH,
County Attorney.
JOHN W. PARISH,
WILLIAM F. GURLEY,
Attorneys for Plaintiff.
I. J. DUNN,
S. R. RUSH,
Attorneys for Defendants.

Filed Aug. 26 1904

FRANK A. BROADWELL, *Clerk.*

Entered.

23 OMAHA, NEB., *August 26"*, 1904.

I hereby certify that the within and following is a full, true and complete copy of the proceedings had upon the trial of the case of State of Nebraska *vs.* Harry V. Hayward and Nicholas V. Halter, and that the same contains all of the evidence offered or given by either of said parties upon the trial of said case, and likewise contains all objections and motions relating to such evidence, made by either party, the rulings of the Court on such objections and motions, and the exceptions of the respective parties to such rulings.

I further certify that said trial was had at the time and place hereinafter mentioned, and that upon application of defendants, this Bill of Exceptions is allowed by me and ordered made a part of the record in this case.

By the court,

E. M. BARTLETT,
Judge of the District Court of the Fourth Judicial District, Who Tried Said Cause.

Filed Aug. 26, 1904.

FRANK A. BROADWELL, *Clerk.*

Entered.

24 STATE OF NEBRASKA, *Douglas County, ss:*

I, Frank A. Broadwell, Clerk of the District Court, Fourth Judicial District of the State of Nebraska, in and for said County do hereby certify that this is the original bill of exceptions filed in my office in the cause in said Court, wherein State of Nebraska is Plaintiff and H. V. Hayward *et al.* are defendants.

Witness my signature and official seal this 13th day of September, 1904.

FRANK A. BROADWELL, *Clerk*,
[SEAL.] By JOHN H. GROSSMANN, *Deputy*.

OMAHA, NEBRASKA, *July* 30, 1904.

I hereby certify that the following is a true and complete transcript of all the testimony, oral and documentary, offered or given by either of the parties hereto upon the trial of this cause, together with all the objections and motions made by either party, the rulings of the Court on the same, and the exceptions of the respective parties to such rulings, as shown by my shorthand notes taken upon the trial of said cause.

CHAS. W. PEARSALL,
Official Stenographic Reporter of the Fourth Judicial District, Who Reported Said Cause.

Filed Aug. 26, 1904.
FRANK A. BROADWELL, *Clerk*.

25 In the District Court for the County of Douglas.

Doc. —, No. —.

STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Bill of Exceptions.

Be it remembered that within the District Court, within and for the County of Douglas, and State of Nebraska, at the regular May, 1904, Term thereof, to-wit, on the 27th day of June, 1904, before the Honorable E. M. Bartlett, one of the Judges of said Court, John W. Parish and W. F. Gurley, appearing for the plaintiff, and S. R. Rush and I. J. Dunn, appearing for the defendants, and said cause coming on for hearing before the Court and Jury, the following proceedings were had, viz:

The plaintiff to maintain the issues on its part to be maintained, produced the following evidence.

(Stamped:) Filed Aug. 26, 1904. Frank A. Broadwell, Clerk. Entered.

26 Mr. RUSH: Comes now the defendants and each of them and demur and object to the introduction of any testimony or evidence in this case whatever, for the following reasons:

The law upon which this complaint is based is in violation of the Constitution of the State of Nebraska and of the United States and particularly of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and is null and void.

2. The defendants further object to the introduction of any testi-

mony or evidence whatever in this case for the reason that the law upon which this complaint is based infringes upon the personal liberty, guaranteed to the defendants by both the Constitution of the United States and the Constitution of the State of Nebraska, and also deprives the defendants as citizens of the United States of the right exercise the privilege impliedly, if not expressly, guaranteed to them by the Federal Constitution and the laws of the United States.

3. The defendants further object to the introduction of any testimony whatever under this complaint for the reason that the law upon which this complaint is based permits the use of the National flag for publishers, newspapers, periodicals, books, ornamental pictures and also on articles of jewelry, but forbids its use, under penalty, for advertising purposes generally, thus discriminating in favor of one class of occupations, and against all others and is therefore class legislation and null and void.

27 Objection is overruled. Defendants and each of them except.

Defendants herein, Harry V. Hayward and Nicholas V. Halter and each of them for himself admits that the facts with reference to the charge set forth in the information herein, are as follows, to-wit:

It is admitted that on the 28th day of December, A. D., 1903, the defendants were engaged in the retail liquor business in the City of Omaha, Douglas county, Nebraska, and on said day were engaged in selling and did sell beer in pint and quart bottles in their place of business in said City, County and State, as retail liquor dealers as charged in said information; that a large number of bottles of beer was sold by them at said place of business on said date, had on them three labels at different places on said bottles, all of said labels being of the same character except in size, and being practically the same label and similar to the label marked herein "Exhibit 1."

It is further admitted that on the day named in the information the defendants and each of them did expose to public view, sell, expose for sale, and had in their possession for sale said bottled beer above referred to, and upon each of said bottles there appeared said label marked, "Exhibit 1," and also upon each of said bottles appeared the two similar labels above referred to, an exact duplicate of said labels and each of them, being marked Exhibit 2, and Exhibit 3 respectively.

It is further admitted that the bottled beer above referred
28 to, on which appeared said labels was manufactured for sale and sold to the defendants by the Willow Springs Brewing Company, a corporation engaged in the manufacture and sale of beer in Douglas county, Nebraska; that the beer referred to is known as the "Stars and Stripes," and upon the bottles so sold by the said Willow Springs Brewing Company are placed the labels above referred to, marked Exhibits 1, 2 and 3 respectively.

That at the time of the filing of the complaint herein, to-wit, December 28th, 1903, said labels had been in use by said Willow Springs Brewing Company in the manner aforesaid for a long time, to-wit: since May 18th, 1902.

It is further admitted that on or about September 19th, 1903, the Government of the United States of America granted a patent to the said Willow Springs Brewing Company of the words used in said label, to-wit, "Stars and Stripes" (for beer).

It is also admitted by the parties hereto that said labels hereinbefore referred to marked Exhibits 1, 2 and 3 respectively have been used by the Willow Springs Brewing Company as a trade mark in the ordinary and usual course of business for advertising purposes and for the purposes of designating its particular product or brand of beer by the patent so designated from other similar products, of other Brewing companies; the said trade mark and advertising scheme is of special value to the said Willow Springs Brewing Company in its business, and to be deprived of said trade-mark and label as shown in Exhibit 1, would be a great financial injury to
29 the Willow Springs Brewing Company.

The purpose of said label was to advertise said brand of beer and to designate said brand from other products of a similar character.

It is admitted by the plaintiff and the defendants herein that all of the foregoing facts stated are true.

The State now offers in evidence, Exhibit No. 1 referred to in the agreed statement of facts. Same received without objection.

The State now offers in evidence Exhibit No. 2, referred to in the agreed statement of facts. Same received without objection.

The State now offers in evidence Exhibit No. 3, referred to in the agreed statement of facts. Same received without objection.

30 Comes now the defendants and each of them and moves the Court to instruct the Jury to return a verdict for the defendants and each of them, for the following reasons:

1. The law upon which this complaint is based is in violation of the Constitution of the State of Nebraska, and of the United States and particularly of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and is null and void.

2. The defendants further object to the introduction of any testimony or evidence whatever in this case for the reason that the law upon which this complaint is based infringes upon the personal liberty, guaranteed to the defendants by both the Constitution of the United States and the Constitution of the State of Nebraska, and also deprives the defendants as citizens of the United States of the right to exercise the privilege impliedly, if not expressly, guaranteed to them by the Federal Constitution and the laws of the United States.

3. The defendants further object to the introduction of any testimony whatever under this complaint for the reason that the law upon which this complaint is based permits the use of the National flag for publishers, newspapers, periodicals, books, ornamental pictures and also on articles of jewelry, but forbids its use, under penalty, for advertising purposes generally, thus discriminating in favor of one class of occupations, and against all others and is therefore class legislation and null and void.

4. Also for the further reason that the evidence in the case
31 does not sustain the charge set forth in the information.

5. Also for the further reason that no offense is charged in the information under the Statutes of this State.

Motion overruled and the defendants and each of them except.

32 EXHIBIT No. 1.

WILLOW SPRINGS BREWING CO.
STARS & STRIPES
SPECIAL BREW
THE CELEBRATED WILLOW SPRINGS WATER USED IN MAKING THIS BEER
OMAHA, NEB. U.S.A.

33 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of Exhibit No. 1, in the case of Halter *vs.* State, No. 13955, with the original now on file in my office, and that the same is a correct copy thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 15th day of December, 1965.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY, *Clerk.*

34 EXHIBIT No. 2.

35 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of Exhibit No. 3, in the case of Halter *vs.* State, No. —, with the original now on file in my office, and that the same is a correct copy thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 15th day of December, 1905.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY, *Clerk.*

36 EXHIBIT No. 3.

37 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of Exhibit No. 3, in the case of Halter *vs.* State, No. —, with the original now on file in my office, and that the same is a correct copy thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 15th day of December, 1905.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY, *Clerk.*

38 Endorsed: 8-137. Filed Aug. 26, 1904. Frank A. Broadwell, Clerk. Entered. 13955. Nicholas V. Halter, *et al., v.* State of Nebraska. Bill of Exceptions. Supreme Court of Nebraska. Filed Sep. 21, 1904. H. C. Lindsay, Clerk.

And on the same day there was issued out of the office of the Clerk of said Supreme Court a certain Summons in the words and figures following, to-wit:

Summons in Error.

THE STATE OF NEBRASKA, *ss:*

To the Sheriff of the County of Lancaster:

You are hereby commanded to notify the State of Nebraska that a petition in error has been filed in the Supreme Court of Nebraska by Nicholas V. Halter and Harry V. Hayward asking the reversal of a judgment against them rendered July 8th, 1904, in a certain cause in the District Court of Douglas County, wherein the State of Nebraska was Plaintiff and Nicholas V. Halter and Harry V. Hayward were Defendants and to appear before the Supreme Court, at the city of Lincoln, on the 3rd day of January, 1905, then and there to do and receive what the said Supreme Court shall order in the premises.

You will make due return of this summons on or before the 3rd day of January, 1905.

Witness my hand and the Seal of said Court, at the city of Lincoln, this twenty-first day of September, A. D. 1904.

[SEAL.] H. C. LINDSAY, *Clerk.*

39 And on the same day said Summons was returned and filed in the office of the Clerk of said Supreme Court with service endorsed thereon in words and figures as follows, to-wit:

Service of the within Summons in Error acknowledged this 21st day of September, 1904.

F. N. PROUT,
Attorney General.

Endorsed: 13955. Supreme Court State of Nebraska. Halter, *et al. v.* State of Nebraska. Summons in Error. Supreme Court of Nebraska. Filed Sep. 21 1904. H. C. Lindsay, Clerk.

And afterward, on the 20th day of January, the following among other proceedings were had and done, to-wit:

The following causes were submitted to Commission No. 2 on briefs of counsel:

* * * * * * *

13955. Halter *v.* State. Error to Douglas county.

And afterward, to-wit, on the 19th day of October, 1905, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Judgment in the words and figures following, to-wit:

NICHOLAS V. HALTER, HARRY V. HAYWARD, Plaintiffs in Error,
v.
STATE OF NEBRASKA, Defendant in Error.

Error to the District Court of Douglas County. No. 13955.

40 This cause coming on to be heard upon proceedings in error to the district court of Douglas county, was argued by counsel and submitted to the court; upon full consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court, and it is therefore considered, ordered and adjudged that the judgment of said district court be, and the same hereby is affirmed; that defendant in error pay all costs incurred herein by it, taxed at $—, and have and recover from plaintiffs in error all its costs so expended herein; that plaintiffs in error pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said court, pursuant to which the preceding judgment was rendered, which opinion is in the words and figures following, to-wit:

41 No. 13955.

HALTER
v.
STATE OF NEBRASKA.

Opinion. Filed October 19, 1905.

Commissioner's Opinion, Department No. 2.

The power to prohibit the use of the national flag does not belong exclusively to the federal congress, but may be exercised by the several states.

2. Chap. 39, Laws of 1903 (Cobbey's Annotated Statutes, Secs. 2375*g, et seq.*), entitled "An Act to prevent and punish the desecration of the flag of the United States" is not obnoxious to the 14th amendment to the constitution of the United states, nor to the provisions of the state constitution against depriving any person of his property without due process of law, and against special or class legislation.
3. Notwithstanding the 14th amendment to the federal constitution the state, in the exercise of the police power, may enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws operate to restrict the liberty of citizens of the United States.
4. But whether legislation thus operating is in fact calculated to promote such ends, is a legitimate subject of inquiry by the court when the constitutionality of the act is assailed.
42 5. An act which is calculated to foster sentiments of patriotism is not vulnerable to the objection that it is not calculated to promote the welfare of society.

43 ALBERT, *C.:*

The defendant was convicted of a violation of the statute entitled "An Act to prevent and punish the desecration of the flag of the United States." (Chap. 139, Laws of 1903, Cobbey's Annotated Statutes, 2375*g, et seq.*)

It is conclusively established that the defendants were engaged in selling intoxicating liquors at retail, and sold and offered for sale beer contained in bottles, to which was attached a label, on which there was printed a representation of the flag of the United States, and that such label was so used to advertise the beer and distinguish it from other products of a like nature. It is admitted that the beer was sold to the defendants by a brewing company in the bottles thus labeled, and, that the representations of the flag thereon is a part of the registered trade mark of the brewing company.

It is now claimed that the statute under which the defendant was convicted is unconstitutional and consequently that the judgment of conviction must be reversed. The statute is as follows:

"Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color,
or ensign, upon which shall be printed, painted or otherwise
44 placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose, to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguished, the article, or substance on which so placed, or who shall

publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both in the discretion of the court.

"The words flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the
45 same, without deliberation may believe the same to *pre*present the flag, color, standard, or ensign, of the United States of America.

This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationary for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisement."

The defendants take the position that the act contravenes Sec. 1 of the 14th Amendment to the Federal Constitution, which prohibits the states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or, which shall deprive any person of life, liberty or property, without due process of law, and the provisions of the state constitution against special or class legislation. This position is supported by two cases, Ruhstrat *v.* People, 185 Ill., 133, 49 L. R. A., 181, and People *ex rel.* McPike *v.* Van de Carr, — N. Y., —, 70 N. E., 965. In each of these cases a statute, substantially like the one under consideration, was held unconstitutional.

The Illinois case rests on three propositions, which, for
46 convenience, we shall consider out of the order in which they are there discussed.

As to the first, namely, that the act is unconstitutional "as depriving a citizen of the United States of the right of exercising a privilege, impliedly, if not expressly, granted to him by the federal constitution," little need be said. The right to advertise whiskey, beer, tobacco and other articles of merchandise by the use of the national flag is certainly not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is not prohibited. If the fact that an act or course of action is not prohibited by the federal constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our

criminal code is largely waste paper. A moment's reflection would seem sufficient to show that the proposition is utterly unsound.

Nor can we agree with counsel that the federal government has the exclusive power to regulate the use of the national flag. It is not infrequent that the same act is an offense against both the state and federal governments. Counterfeiting furnishes an apt illustration. The power "to provide for the punishment of counterfeiting the securities and current coin of the United States" is expressly given to Congress, but the offense is also punish-
47 able under the laws of the several states, the validity of which was upheld in Fox *v.* State, 5 How. (U. S.), 416.

The second proposition to be noticed is "that the act is also unduly discriminating and partial in its character." This proposition is based on the exceptions to the general provisions of the act. The exceptions enumerated in the Illinois act are fewer than in our own but we do not think it can fairly be said that in either case they render the act unduly discriminating or partial. Neither act is aimed against any individual or class of individuals, but against certain acts. If it were competent for the legislature to deal with the subject it was clearly competent for it to define the crime of desecration, and to specify the acts constituting the offense. Every use of the flag not included in such definition or specification would be impliedly excepted from the operation of the act, and it would seem wholly immaterial that the legislature saw fit to make some acts the subject of an express exception instead of narrowing the definition of the crime, or the specification of the acts constituting it, in such a way as to exclude the acts included in such exception. Besides there is nothing in the state or federal constitution which forbids the classification of subjects for legislation, so long as the classification is not arbitrary. Lancashier Ins. Co. *v.* Bush, 60 Nebr., 116, and cases cited. There this court held that the statute providing for the taxing of an attorney's fee against a defeated insurance com-
48 pany was valid legislation. See also Rosenbloom *v.* State, 6 Nebr., 344; State *v.* Montgomery, 45 Atl. (Me.), 13; *Ex parte* Thornton, 12 Fed., 538; Davis *v.* State, 51 Nebr., 302.

In this instance, the classification does not appear to be an arbitrary, but a most natural one. It is a matter of common knowledge that the use of the flag for advertising purposes offends the sensibilities of a large portion of our people. The statute is directed against the use of the flag for that purpose, but excepts from its provision certain uses to which the most sensitive could not object. Without such exception, either express or implied, the statute would be oppressive, if not absurd.

We come now to the remaining proposition on which the Illinois case rests, namely, that "the statute is an infringement upon the personal liberty guaranteed by the state and federal constitutions." The court in that case recognizes the right of the state, in the exercise of its police power, to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but holds that such laws must be in fact calculated to promote

those objects, or some of them, otherwise they are an arbitrary restraint on the citizen and unconstitutional. Such is the generally accepted doctrine. Lochner *v.* People, 25 Sup. Ct. Rep., 539, contains a discussion of the police power of the states, and an
49 examination of many cases bearing on the subject. After a somewhat lengthy discussion of the doctrine just referred to, the court in Ruhstrat *v.* People, *supra,* held that the statute was not calculated to promote any of the objects just enumerated and was therefore unconstitutional and void. Again we find ourselves unable to agree with a court to whose opinions, ordinarily, we attach great weight.

Patriotism has ever been regarded as the highest civic virtue, and whatever tends to foster that virtue certainly makes for the common good. That familiarity breeds contempt has the force of a maxim. That contempt or disrespect for an emblem begets a like state of mind toward that for which it stands, is a psychological law which underlies the canons against profanation which abound in every system of religious instruction. Such inhibitions against the irreverent use of sacred things are not mere arbitrary fulmination, but are grounded on sound practical considerations and the conviction that such use of the sacred emblems of religion is inimical to the cause of religion itself. The legislation under consideration may be justified on the same principle. The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future—and it is not fitting that it should
50 become associated in his mind with any thing less exalted nor that it should be put to any mean or ignoble use.

Moreover, that the citizen resents any improper use of the flag of his country, and that his resentment is frequently carried to the extent of a breach of the peace, are matters of common knowledge. The State has the undoubted right to legislate in the interests of the public peace. As was said in Udegraph *v.* Commonwealth, 11 Serg. & Rawl. (Pa.), 406, "An offense against the public peace may consist either of an actual breach of the peace, or doing that which tends to provoke or excite others to do it. Within the latter fall all acts and attempts to produce disorder, by written, printed or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual." The doctrine announced in that case seems peculiarly applicable to the case in hand, and to justify the act in question as a valid exercise of the police power of the state.

In McPike *v.* Van De Carr, *supra,* the act was not held wholly void, but only in so far as it applies to articles manufactured and in existence when the act went into effect. To that extent it was held unconstitutional as in contravention of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. If the statute is vulnerable to that ob-
51 jection, it would seem that a large number of our penal statutes, commonly regarded as valid, must fall by the same

rule. When our act against taking fish with a seine went into effect there were doubtless many seines manufactured and in existence; the same may be said of swivel guns, when the act making it unlawful to kill certain wild water fowl with such guns became a law. But to our knowledge it has never been seriously claimed that either of such acts is unconstitutional and void to the extent that it applies to "articles manufactured and in existence when the act went into effect." By sweeping prohibitory legislation, those engaged in the manufacture and sale of intoxicating liquors were put out of business in the state of Kansas, and property whose chief value consisted in its use in connection with the manufacture and sale of such liquors was rendered practically valueless. The validity of this legislation was assailed on the ground that it operated to deprive those engaged in the traffic in intoxicating liquors of their property without due process of law. Mungler *v. Kansas*, 123 U. S., 623. Considering that feature of the case, the court said: "Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented or other intoxicating liquors, to be used as a beverage, may be enforced against persons, who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the
52 diminution in its value resulting from such prohibitory enactments."

Nor does the fact that the flag was a part of the trade mark of the brewing company, place the defendants in any more favorable position. To the extent that the said trade mark is property, it comes within what has already been said. A patent or trade mark puts no restraint upon the state in the exercise of its police power, beyond the restraint imposed with respect to property generally. Patterson *v.* Kentucky, 97 U. S., 507.

We have gone over the act in the light of excellent briefs on either side and have reached the conclusion that it is not only a valid piece of legislation, but one well calculated to promote the common weal.

It is therfore recommended that the judgment of the district court be affirmed.

Duffie, C. and Jackson, C. concur.

By the COURT: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

53 And afterward, to-wit, on the 28th day of November, there was filed in the office of the Clerk of said Supreme Court a certain Petition for Writ of Error, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER and HARRY V. HAYWARD, Appellants,
v.
STATE OF NEBRASKA, Appellee.

Petition for Writ of Error.

To the Honorable Silas A. Holcomb, Chief Justice of the Supreme Court of the State of Nebraska:

The petitioners, Nicholas V. Halter and Harry V. Hayward, appellants, by their attorney, S. R. Rush, respectfully show that they are citizens of the United States of America and of the State of Nebraska; that on the 19th day of October, A. D. 1905, final judgment was rendered against them by the Supreme Court of the State of Nebraska, in a certain cause wherein Nicholas V. Halter and Harry V. Hayward were plaintiffs in error, and the State of Nebraska was defendant in error, affirming the sentences and judgment of the trial Court imposed upon your petitioners by said Court as will appear by reference to the record and proceedings in said cause filed herein; that said Supreme Court of the State of Nebraska is the highest Court of law or equity in said State of Nebraska, wherein it was adjudged that the provisions of Chapter 39, laws of 1903, in and for the State of Nebraska (Cobbey's Annotated
54 Statutes, Sections 2375G, *et seq.*) entitled "An Act to prevent and punish the desecration of the flag of the United States," which law made it a misdemeanor on and after July 9, 1903, for any person in said State to manufacture, sell or expose for sale, any article of merchandise on which should be placed a representation of the flag of the United States, and generally the use of the flag for advertising purposes, were not in conflict with the provisions of Section one (1) of the fourteenth amendment to the Federal Constitution, in that the provisions of said Act did not deprive certain citizens of the United States and of the State of Nebraska of rights, privileges and immunities secured to other citizens of the United States and of the State of Nebraska, nor of liberty or property without due process of law or the equal protection of the law, as appears by the record of the proceedings in said cause.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska, and the Justice thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioners may be examined and corrected and said judgment reversed and your petitioners discharged; and your petitioners will ever pray.

NICHOLAS V. HALTER,
HARRY V. HAYWARD,
By S. R. RUSH, *Their Attorney.*

55 Endorsed: 13955. Hayward, *et al., v.* State of Nebraska. Petition for Writ of Error. Supreme Court of Nebraska. Filed Nov. 28, 1905. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Assignment of Errors in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER and HARRY V. HAYWARD, Appellants,
v.
STATE OF NEBRASKA, Appellee.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska.

Now come the said plaintiffs in error and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled matter, there is manifest errors in this, to-wit:

1. The Court erred in holding that the provisions of Chapter 39, laws of the State of Nebraska for 1903, (Cobbey's Annotated Statutes, Sections 2375-G, *et seq.*) entitled "An Act to prevent and punish the desecration of the flag of the United States," were not in conflict with and in violation of the provisions of the fourteenth
56 amendment of the Constitution of the United States, for that the State of Nebraska, by and through the provisions of said Chapter 39, assumes and seeks (1) to deprive the plaintiffs in error and certain other citizens of the United States and of the State of Nebraska, of rights, privileges and immunities secured to every citizen of the United States and of the said State; (2) to deprive the plaintiffs in error and other citizens of the United States, of liberty and property without due process of law; (3) to deprive and to deny to the plaintiffs in error and certain other citizens and persons within the jurisdiction of the State of Nebraska, the equal protection of the law.

2. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of rights, privileges and immunities secured to other citizens of the United States and of the State of Nebraska, by the Federal Constitution and laws of the United States.

3. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of liberty and property without due process of law.

4. The Court erred in holding that the provisions of said Act do not deny to the plaintiffs in error the equal protection of the law.

5. The Court erred in holding that said Act and the authority exercised thereunder and thereby authorized to be exercised there-

under, is within the police power of the legislature of the State of Nebraska.

57 6. The Court erred in holding that the provisions of said Act making it unlawful for the plaintiffs in error to use, in a respectful way, a representation of the flag of the United States in their business for advertising the same, to be within the police power of the State.

7. The Court erred in holding the provisions of said Act denying the plaintiffs in error the right to use said flag in a respectful way, in their said business for advertising purposes, not to be an abridgement of the inalienable and statutory right of plaintiffs in error to pursue a lawful avocation in a lawful way without interference by the State.

8. The Court erred in holding that the provisions of said Act do not unlawfully discriminate between those persons engaged in manufacturing and selling articles of merchandise, and those engaged in publishing a newspaper, periodical, book, pamphlet, certificate or stationery, or those engaged in the manufacture and sale of jewelry.

9. The Court erred in holding that the provisions of said Act do not cast special burdens upon those engaged in manufacturing and selling general articles of merchandise, from which persons engaged in publishing newspapers, periodicals and printing stationery, and manufacturing and selling jewelry, are exempt.

10. The Court erred in holding that said Act does not grant special privileges to certain citizens which it denies to the plaintiffs in error and to other citizens of the State of Nebraska.

11. The Court erred in holding that the provisions of said Act are uniform in their operation throughout the State of

58 Nebraska upon all citizens of the State similarly situated.

12. The Court erred in holding that the provisions of said Act do not deprive the plaintiffs in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation.

13. The Court erred in holding that the United States does not have the exclusive power to regulate the use of the national flag.

14. The Court erred in holding that the use of the flag of the United States for advertising purposes in a lawful business and in a respectful way, offends the sensibilities of a large portion of our people.

15. The Court erred in holding that familiarity with the flag breeds contempt for it and that for which it stands.

16. The Court erred in holding that the use of the flag of the United States in a respectful way and in a lawful business, for advertising purposes, is an offense against the public peace.

17. The Court erred in ordering judgment to be entered affirming the judgment and sentences of the District Court in and for Douglas county, Nebraska.

18. The Court erred in ordering judgment to be entered and in entering judgment directing the District Court of Douglas county, Nebraska, to execute and inflict the sentences and judgment therein imposed upon plaintiffs in error.

S. R. RUSH,
Attorney for Plaintiff in Error.

59 Endorsed: 13955. Halter, *et al. v.* State of Nebraska. Assignment of Errors. Supreme Court of Nebraska. Filed Nov. 28 1905. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error, which said original Writ of Error is hereto attached, and is in the words and figures following, to-wit:

60 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment and sentences, of a cause which is in the said Supreme Court of the State of Nebraska, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in said suit between Nicholas V. Halter and Harry V. Hayward, plaintiffs in error, and the State of Nebraska, defendant in error, wherein was drawn in question the validity of a statute of, and an authority exercised under, the said State, on the ground of their being repugnant to the constitution and laws of the United States, and the decision was in favor of such, their validity; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the Constitution, to-wit, the fourteenth amendment, a manifest error hath happened, to the great damage of the said Nicholas V. Halter and Harry V. Hayward, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the

61 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 28 day of December 1905, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of November, in the year of our Lord one thousand nine hundred and five.

[Seal United States Circuit Court, District of Nebraska.]

GEO H. THUMMEL,
Clerk of the Circuit Court of the United States
for the District of Nebraska,
By JOHN NICHOLSON, *Deputy.*

Writ of error allowed upon the execution of a bond by the said Nicholas V. Halter and Harry V. Hayward, complainants in error, in the sum of Five hundred ($500) Dollars, said bond when approved to act as a supersedeas.

Dated this 28th day of Nov'b'r, 1905.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

[Endorsed:] 13955 Halter *et al vs.* State of Nebraska Writ of Error Supreme Court of Nebraska Filed Nov. 28 1905 H. C. Lindsay Clerk.

STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that this is the original Writ of Error filed in my office on the 28th day of November, A. D., 1905.

Witness my hand and the Seal of said Supreme Court this 15th day of December, A. D., 1905.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

62 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER and HARRY V. HAYWARD, Appellants,
v.
STATE OF NEBRASKA, Appellee.

Bond.

Know all men by these presents, that we, Nicholas V. Halter and Harry V. Hayward, as principals, and Walter Moise, as surety are held and firmly bound unto the State of Nebraska in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the State of Nebraska, to which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at the September term, A. D., 1905, of the Supreme Court of the State of Nebraska, in a suit pending in said Court between the said Nicholas V. Halter and Harry V. Hayward, as plaintiffs in error, and the State of Nebraska, defendant in error, a judgment affirming the judgment and sentences of the District

Court for Douglas County, Nebraska, was rendered against
63 the said Nicholas V. Halter and Harry V. Hayward, and the said Nicholas V. Halter and Harry V. Hayward have obtained a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska, to reverse the judgment and sentences in the aforesaid suit, and a citation directed to the said State of Nebraska, citing and admonishing the said State of Nebraska to be and appear in the United States Supreme Court at Washington, District of Columbia, thirty days from and after the date of said citation, which citation has been duly served.

Now, the conditon of the above obligation is such that if the said Nicholas V. Halter and Harry V. Hayward shall appear, either in person or by attorney, in the United States Supreme Court at Washington, District of Columbia, on such date or dates as may be appointed for the hearing of said cause in said Court, and prosecute their said writ of error, and shall abide by and obey all orders made by the United States Supreme Court in said cause, and shall surrender themselves in execution of the judgment and sentences appealed from, as said Court may direct if the judgment and sentences against them shall be affirmed; and if they shall appear for trial in the District Court of Douglas county, Nebraska, on such day or date as may be appointed for a retrial by said Court, and abide by and obey all orders made by said Court, provided the judgment and sentences against them shall be reversed by the Supreme Court of the United States, *and abide by and obey*
64 *all orders made by said Court, provided the judgment and sentences against them shall be reversed by the Supreme Court of the United States*, then the above obligation to be void, otherwise to remain in full force and effect.

NICHOLAS V. HALTER,
HARRY V. HAYWARD,
Principals.
WALTER MOISE, *Surety.*

STATE OF NEBRASKA, *County of Douglas, ss:*

On this 28th day of November, 1905, before me personally appeared Nicholas V. Halter and Harry V. Hayward, to me known to be the persons described in and who executed the foregoing bond, and acknowledged that they executed the same as their free act and deed.

Witness my hand and seal the date aforesaid.

[SEAL.] E. W. STOLTENBERG,
Notary Public.

STATE OF NEBRASKA, *County of Douglas, ss:*

On this 28th day of November, 1905, personally appeared before me Walter Moise personally known to me to be the persons described in and who executed the foregoing bond as surety, and acknowledged that he executed the same as his free act and deed; and who being duly sworn deposes and says that he is the owner

in fee simple of real estate free of all exemptions and encumbrances, in the State of Nebraska, and that same is worth over
65 two thousand ($2000.00) Dollars.

Witness my hand and seal the date aforesaid.

[SEAL.] E. W. STOLTENBERG,
Notary Public.

The within bond and surety thereon approved by me this 28th day of November, 1905.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13955. Halter, *et al. v.* State of Nebraska. Bond and Approval. Supreme Court of Nebraska. Filed Nov 28 1905. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Citation in the words and figures following, which said original Citation with acceptance of service thereon by Norris Brown, Attorney General is hereto attached;

66 UNITED STATES OF AMERICA, *ss:*

To the State of Nebraska, Greeting:

You are hereby notified and admonished to be and appear at a Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Nicholas V. Halter and Harry V. Hayward are plaintiffs in error and the said State of Nebraska is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 28th day of November, in the year of our Lord one thousand nine hundred and five.

[Seal Supreme Court of Nebraska.]

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

Attest:
H. C. LINDSAY,
Clerk Supreme Court.

Copy of the within citation received this 4th day of December, 1905, at the office of the Attorney-General of the State of Nebraska.

MORRIS BROWN,
Attorney General.

Supreme Court of Nebraska Filed Dec. 4, 1905.
H. C. LINDSAY, *Clerk.*

STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that this is the original citation filed in my office on the 28th day of November, A. D. 1905.

Witness my hand and the Seal of said Court this 15th day of December, A. D., 1905.

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

[Endorsed:] 13955 Halter *et al. v.* State of Nebraska Citation Supreme Court of Nebraska Filed Nov 28 1905 H. C. Lindsay, Clerk.

67 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record and opinion of the Court and final judgment in a case in said Court wherein Nicholas V. Halter and Harry V. Hayward are plaintiffs in error, and The State of Nebraska, is defendant in error, as fully as the same is of record and on file in my office.

I further certify that the annexed petition for writ of error, assignments of error, and allowance and bond are true and correct copies of the originals which were lodged in my office, together with a copy of the original writ of error, for the defendant in error, the State of Nebraska, all of which said original papers were filed in my office on the 28th day of November, A. D. 1905. That the original writ of error and the original citation were duly filed in my office on said 28th day of November, A. D., 1905, and are hereto attached, copies of which said original papers are retained in my office, and the whole as set forth above is now returned in obedience to said writ of error. And I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

Witness my hand and seal of the Supreme Court of the State of Nebraska, this 15 day of December, A. D. 1905.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

Endorsed on cover: File No. 20,026. Nebraska supreme court. Term No. 174. Nicholas V. Halter and Harry V. Hayward, plaintiffs in error, *vs.* The State of Nebraska. Filed December 28th, 1905. File No. 20,026.